IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

CHRISTY B. DOWNS,

Plaintiff,

v. Civil Action No: 5:13cv00083

WINCHESTER MEDICAL CENTER, *et al.*,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT PURSUANT TO RULE 12(b)(6)

Defendants, Winchester Medical Center ("WMC") and Valley Health System ("VHS"), by counsel and pursuant to Federal Rule of Civil Procedure 12(b)(6), move this Court to dismiss the Amended Complaint filed by Plaintiff, Christy B. Downs, on the following grounds.

INTRODUCTION

Plaintiff's Amended Complaint contains three counts, two asserting violations of the Family and Medical Leave Act ("FMLA") and the third a violation of the Americans with Disabilities Act ("ADA"). Plaintiff, however, fails to allege sufficient facts that would allow the Court to conclude that she can even meet the threshold elements for these claims. Her Amended Complaint is deficient and should be dismissed with prejudice.

Plaintiff also seeks punitive damages in her Amended Complaint. She does not, however, allege any facts to support such an award. In the event her claims are not dismissed in their entirety, her request for punitive damages should be dismissed regardless due to her failure to plead sufficient facts to support such an award.

RELEVANT FACTS

Plaintiff alleges she was employed by VHS and WMC. (Am. Compl. ¶ 7).[1] She claims to have "serious health conditions," specifically, migraine headaches, hypertension, anxiety and depression, and that these conditions constitute a "disability." (Am. Compl. ¶¶ 4, 33). She does not, however, set forth any facts explaining how these conditions rise to the level of a "disability" under the ADA, or why she is a "qualified individual" entitled to the ADA's protections, which are the threshold elements of an ADA claim. *See* 42 U.S.C. § 12112(a) (setting forth two primary elements).

Plaintiff also alleges that, during her employment, she used intermittent leave available under the FMLA due to her health issues, and began using increasing FMLA leave in 2010. (Am. Compl. ¶¶ 13-14). In support of her FMLA claim, she alleges that she "suffered from a serious medical condition as that term is defined in 29 U.S.C. § 2611." (Am. Compl. ¶ 30). But once again, she does not allege any facts demonstrating that her "condition" meets the threshold for FMLA protection. *See* 29 U.S.C. § 2611(11) (defining "serious medical condition).

Despite the lack of any well-pleaded facts establishing that Plaintiff qualified for ADA and FMLA protection, Plaintiff alleges that Defendants discriminated against her because of her "disability" and her use of FMLA leave. As examples of Defendants' alleged discriminatory conduct, Plaintiff claims that her supervisor, Dena Kent, "singled out and verbally abused" her because she was absent from work, strictly monitored her employment and attendance, and held her to a stricter standard and treated her differently from her co-workers. (Am. Compl. ¶¶ 15-17). The claimed "verbal abuse" consists of the following comments, given as examples of the type of "harassing and disparaging" conduct allegedly directed toward Plaintiff:

[1] Plaintiff actually was employed by Valley Regional Enterprises, Inc., a corporate subsidiary of VHS.

- "Well if you were ever here . . . ." (ellipses in pleading);
- "I guess I have to be my own secretary because you are never here"; and
- "It was emailed to you, but you weren't here, so I guess you didn't get it."

(Am. Compl. ¶ 16).

Aside from these relatively benign remarks, Plaintiff fails to set forth any facts supporting her allegation that she was treated differently from her co-workers due to her use of FMLA leave or her alleged "health conditions" or "disability." The monitoring of Plaintiff's job performance, without any additional factual support, is not reflective of disparate treatment or discrimination.

The lone factual allegation in the Amended Complaint supporting Plaintiff's claim of discriminatory conduct is that Defendants terminated her employment after she complained about being unfairly disciplined on account of her use of FMLA leave. (Am. Compl. ¶¶ 21, 29). But, as described above, there are no additional factual allegations that would allow the Court to conclude that Plaintiff even qualified for the protections of the FMLA or the ADA.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the plaintiff's complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). A sufficient complaint contains enough factual allegations to "show[] that the pleader is entitled to relief." Fed. R. Civ. Proc. 8(a)(2). This rule requires "a 'showing,' rather than a blanket assertion, of entitlement to relief" in order for a pleading to survive dismissal. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n. 3 (2007). That showing must consist of more than "a formulaic recitation of the elements of a cause of action" and "naked assertion[s] devoid of further factual enhancement," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted).

ARGUMENT

The Amended Complaint contains many "naked assertions," but few facts in support. To state a viable claim under the ADA and the FMLA, a plaintiff must at least allege facts demonstrating that she is entitled to the protections of those acts, and that Defendants' alleged conduct rises to the level necessary to be deemed "discriminatory." Plaintiff's Amended Complaint contains insufficient facts to establish these threshold pleading requirements, and it should be dismissed with prejudice for this deficiency.

I. Plaintiff fails to plead sufficient facts supporting her FMLA claims (Counts I & II)

FMLA protection is available only for individuals with conditions involving "(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). The Amended Complaint contains insufficient factual allegations to demonstrate that Plaintiff meets this threshold.

In support of her claims, Plaintiff alleges only that she has "a serious medical condition as that term is defined in 29 U.S.C. § 2611." (Am. Compl. ¶ 30). She sets forth no additional facts demonstrating that such condition involved inpatient care or continuing treatment by a health care provider. Her allegation of a "serious medical condition" is an example of the "labels and conclusions" long held insufficient to state a claim for relief under Rule 12(b)(6). *Giarratano v. Johnson*, 521 F.3d 298, 304 n. 5 (4th Cir. 2008) (quoting *Twombly*, 550 U.S. at 555). Counts I and II should be dismissed accordingly.

In addition to failing to set forth the threshold element of an FMLA claim, Plaintiff's allegations of discrimination, with the exception of her discriminatory discharge allegation, fail to set forth the type of conduct necessary to give rise to a discrimination claim. Plaintiff's case, including her claims based on alleged harassing conduct, should not be allowed to move forward with only these allegations in support.

For instance, Plaintiff claims that she was harassed because of her FMLA use, yet she alleges only common workplace statements as examples of the alleged harassment. (*See* Am. Compl. ¶ 16). No derogatory or discriminatory motive can be inferred from these statements, which do not support Plaintiff's claim that she was "harassed" on account of her FMLA use. Anti-discrimination statutes are not a "general civility code," and "offhand comments and isolated incidents (unless extremely serious) will not amount to discrimination." *Jennings v. Univ. of N.C.*, 482 F.3d 686, 696 (4th Cir. 2007). Instead, any alleged harassment must be both severe and pervasive to state a claim, and the employee "must clear a high bar in order to satisfy the severe or pervasive test." *EEOC v. Central Wholesalers*, 573 F.3d 167, 176 (4th Cir. 2009). Plaintiff's allegations do not satisfy this "high bar," and they are not sufficient to state a cause of action for harassment.

Plaintiff's remaining examples of discrimination are also unavailing. She claims her performance was strictly monitored and that she was treated differently from other employees, but she alleges no facts establishing how or in what manner. That such alleged treatment was related to Plaintiff's FMLA use is a conclusion without any factual support. The termination of Plaintiff's employment is the only circumstance set forth in the Amended Complaint that adequately supports her claim of FMLA discrimination. Any alleged discriminatory conduct aside from her termination is unsupported by facts sufficient to allow such conduct to proceed as a basis for Plaintiff's claims.

II. Plaintiff fails to plead sufficient facts supporting her ADA claims (Count III)

Plaintiff's ADA claim is deficient for reasons similar to her faulty FMLA claims, namely, her failure to allege facts setting forth the basic elements of the claim. She does not allege sufficient facts demonstrating that she has a "disability," and she does not allege sufficient facts demonstrating that she is a "qualified individual" who could perform her job with or without a reasonable accommodation, which are required elements of her ADA claim. Count III should be dismissed accordingly.

42 U.S.C. § 12112(a) sets forth the threshold elements of an ADA claim, providing, in pertinent part, that "No covered entity shall [1] discriminate against a [2] qualified individual [3] on the basis of disability." "Thus, in order to make out a *prima facie* case of discrimination, plaintiff must show that she is a qualified individual with a disability or was regarded as having a disability." *McIntyre-Handy v. APAC Customer Servs., Inc.*, 2005 U.S. Dist. LEXIS 41752, *8-9 (E.D. Va. May 12, 2005).

"The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). "The term 'disability' means, with respect to an individual — (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). Various additional statutes and regulations provide examples of the types of factual scenarios that may meet these threshold requirements.

The Amended Complaint claims Plaintiff had certain "health issues," but it contains no facts showing that these issues constituted *disabilities* within the meaning of the ADA. For example, there are no facts within the Amended Complaint showing that Plaintiff's "health issues" substantially limited her major life activities; no facts reflecting Defendants' perception of Plaintiff's health conditions as disabilities; and no facts establishing that Plaintiff had a sufficient "record" of a disability to qualify for ADA protection.

The Amended Complaint also contains no facts establishing that Plaintiff was a "qualified individual," able to perform her job with or without accommodation. In the absence of these threshold factual allegations, Plaintiff has failed to state a viable ADA claim and Count III should be dismissed.

III. There are no facts set forth in the Amended Complaint to support Plaintiff's request for punitive damages

Plaintiff requests an award of punitive damages in her prayer for relief. Such damages are available under the ADA where a plaintiff proves the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The Amended Complaint does not contain any language stating that Defendants acted "with malice or with reckless indifference" to Plaintiff's rights, and, more importantly, contains no *facts* specifically supporting such action. Plaintiff's claim for punitive damages should be dismissed as a result.

WHEREFORE, Defendants Winchester Medical Center and Valley Health System request entry of an Order dismissing Plaintiff's claims with prejudice, and awarding their costs expended herein, and granting such further relief as the Court deems just and proper.

WINCHESTER MEDICAL CENTER
VALLEY HEALTH SYSTEM
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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